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 BANK OF AMERICA, N.A.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA (OAKLAND)

JAY TA-CHIEH YEH, an individual,
 Plaintiff,

v.

BANK OF AMERICA, N.A., a business
 entity; GREEN TREE SERVICING, LLC,
 a business entity; and DOES 1-100,
 inclusive,

Defendants.

Case No. 3:12-cv-05940-EDL

[Assigned to the Hon. Phyllis J.
 Hamilton]

**NOTICE OF MOTION AND
 MOTION TO DISMISS
 PLAINTIFF'S FIRST AMENDED
 COMPLAINT; MEMORANDUM OF
 POINTS AND AUTHORITIES;
 [PROPOSED] ORDER**

[Fed. R. Civ. P. 12(b)(6)]

Document Filed Herewith:
 1. Request for Judicial Notice
 2. [Proposed] Order

Hearing Date: February 27, 2013
Time: 9:00 a.m.
Ctrm.: 3

Complaint Filed: October 22, 2012
Trial Date: None

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2
3 **TO THE COURT AND ALL PARTIES AND TO THEIR COUNSEL OF**
4 **RECORD:**

5 **PLEASE TAKE NOTICE** that on February 27, 2013, at 9:00 a.m., or as soon
6 thereafter as may be heard, in Courtroom 3 of the above-entitled Court located at 450
7 Golden Gate Ave., San Francisco, California 94102, defendant Bank of America, N.A.
8 (**BANA or defendant**) will and hereby does move this Court to dismiss the first
9 amended complaint (**FAC**) filed by plaintiff Jay Ta-Chieh Yeh (**plaintiff**),
10 with prejudice.

11 This motion seeks dismissal under Rule 12(b)(6) of the *Federal Rules of Civil*
12 *Procedure*, on the basis that it fails to state a claim upon which relief may be granted
13 and the FAC is barred as a matter of law against BANA.

14 This motion is based upon this notice, the attached memorandum of points and
15 authorities, and upon all papers and documents on file herein, the Court's files
16 concerning this action, together with those facts and documents of which the parties
17 request judicial notice and/or matters which judicial notice is proper, as well as any oral
18 argument that may be presented at the time of the hearing.

19 Dated: January 15, 2013

Respectfully submitted,

20 **AKERMAN SENTERFITT LLP**

21 By: s/ Karen Ciccone

22 Karen Ciccone
23 Taylor Broadhead
24 Attorney for Defendants
25 BANK OF AMERICA, N.A.
26
27
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TABLE OF CONTENTS

I. INTRODUCTION	1
II. FACTUAL SUMMARY	2
III. LEGAL STANDARD ON MOTION TO DISMISS.....	3
IV. LEGAL ARGUMENT.....	4
A. The Failure to Tender Bars Plaintiff's Equitable Claims	4
B. Plaintiff's Claims Each Fail Individually	6
1) Plaintiff's Claim for Breach of the Covenant of Good Faith and Fair Dealing Fails	6
2) Plaintiff's Promissory Estoppel Claim Fails	9
3) Plaintiff's Claim for Violation of <i>Civil Code</i> Section 2924 Fails	11
4) Plaintiff's Breach of Contract Claim Fails	12
5) Plaintiff's Reformation of Contract Claim Fails	13
6) Plaintiff's False Light Claim Fails	15
7) Plaintiff's Elder Abuse Claim Fails.....	16
8) Plaintiff's Negligent Misrepresentation Claim Fails.....	17
9) Plaintiff's Claim for Violation of <i>Business & Professions</i> <i>Code</i> § 17200 Fails	19
V. CONCLUSION	20

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TABLE OF AUTHORITIES

Cases

<i>Abdallah v. Un. Sav. Bank,</i> 43 Cal.App.4th 1101 (1996).....	6
<i>Abramson v. Juniper Networks, Inc.</i> 115 Cal.App.4th 638 (2004).....	14
<i>Alicea v. GE Money Bank,</i> No. C 09-00091 SBA, 2009 WL 2136969 (N.D. Cal. July 16, 2009).....	5
<i>Anaya v. Advisors Lending Group,</i> No. CV F 09-1191 LJO DLB, 2009 WL 2424037 (E.D. Cal. Aug. 5, 2009).....	5
<i>Anderson v. Angelone,</i> 86 F.3d 932 (9th Cir. 1996).....	3
<i>Arnolds Mgmt. Corp. v. Eischen,</i> 158 Cal.App.3d 575 (1984).....	5
<i>Ashcroft v. Iqbal</i> 129 S.Ct. 1937, 1949 (2009)	3
<i>Birdsong v. Apple, Inc.,</i> 590 F.3d 955, 959-960 (9th Cir. 2009)	19
<i>Carma Developers (California), Inc. v. Marathon Development California, Inc.,</i> 2 Cal.App.4th 342 (1992).....	7
<i>Cel-Tech Comm. v. L.A. Cellular Tel. Co.,</i> 20 Cal.4th 163, 180 (1999).....	19
<i>Clegg v. Cult Awareness Network</i> 18 F.3d 752, 754-755 (9th Cir. 1994)	3
<i>Fin. Sec. Assurance, Inc. v. Stephens, Inc.,</i> 450 F.3d 1257 (11th Cir. 2006).....	4
<i>G.D. Searle & Co. v. Superior Court</i> 49 Cal.App.3d 22 (1975).....	19
<i>Glen Holly Ent'mt, Inc. v. Tektronix, Inc.,</i> 100 F. Supp. 2d 1086, 1101 (C.D. Cal. 1999)	10
<i>Gutierrez v. Wells Fargo Bank,</i> No. C 08-5586 SI, 2009 WL 322915 at *5 (N.D. Cal. Feb. 9, 2009).....	8
<i>Humboldt Sav. Bank v. McCleverty,</i> 161 Cal.285 (1911).....	5
<i>In re GlenFed, Inc. Sec. Litig.</i> 42 F.3d 1541, 1547-48 (9th Cir.1994) (en banc)	18
<i>Jump v. Aurora Loan Servs. LLC, et al.,</i> No. 09 cv 189 W (NLS), 2009 WL 2020128 (S.D. Cal. July 10, 2009).....	6
<i>Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority,</i> 23 Cal.4th 305, 1 P.3d 63 (2000)	9
<i>Karlsen v. Am. Savings & Loan Ass'n,</i> 15 Cal.App.3d 112 (1971).....	8

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1	<i>Khoury v. Maly's of Cal.</i> , 14 Cal.App.4th 612, 619 (1993).....	19
2	<i>Kim v. Sumitomo Bank</i> , 17 Cal. App. 4th 974, 979 (1993).....	9
3	<i>Knieval v. ESPN</i> , 393 F.3d 1068 (9th Cir. 2005).....	4
4	<i>Kruse v. Bank of America</i> , 202 Cal.App.3d 38, 54 (1988).....	9
5	<i>Livid Holdings, Ltd. v. Solomon Smith Barney, Inc.</i> , 416 F.3d 940 (9th Cir. 2005).....	4
6	<i>Locke v. Wells Fargo</i> , 2010 WL 4941456 (S.D. Fla. Nov. 30, 2010)	10
7	<i>Lorenz v. Sauer</i> , 807 F.2d 1509, 1511-12 (9th Cir. 1987)	17
8	<i>Lyons v. Bank of Am., NA</i> , 11-01232 CW, 2011 WL 3607608 (N.D. Cal. Aug. 15, 2011).....	20
9	<i>Montoya v. Countrywide Bank</i> , No. C09-00641 JW, 2009 WL 1813973 (N.D. Cal. June 25, 2009).....	6
10	<i>Nat'l Union Fire Ins. Co. v. Cambridge Integrated Servs.</i> , 171 Cal.App.4th 35, 50 (Ct. App. 2009).....	17
11	<i>Neilson v. Union Bank of Cal.</i> , 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)	17
12	<i>Neubronner v. Milken</i> 6 F.3d 666, 671-672 (9th Cir.1993)	18
13	<i>Nymark v. Heart Fed. Sav. & Loan Ass'n</i> , 231 Cal. App. 3d 1089, 1096 (1991).....	9
14	<i>Odinma v. Aurora Loan Services</i> , No. C-09-4674 EDL, 2010 WL 1199886 (N.D. Cal. Mar. 23, 2010).....	6
15	<i>Parrino v. FHP, Inc.</i> , 146 F.3d 699 (9th Cir. 1998).....	4
16	<i>Pension Trust Fund for Operating Engineers v. Fed. Ins. Co.</i> , 307 F.3d 944 (9th Cir. 2002).....	7
17	<i>Price v. Wells Fargo Bank</i> , 213 Cal. App. 3d 465, 476 (1989).....	8, 9
18	<i>Racine & Laramie, Ltd., Inc. v. Dept. of Parks and Recreation</i> , 11 Cal.App.4th 1026 (1992).....	7
19	<i>Raedeke v. Gibraltar Sav. & Loan Assn'n</i> , 10 Cal.3d 665 (1974).....	8
20	<i>Saldade v. Wilshire Credit Corp.</i> , 686 F.Supp.2d 1051 (E.D. Cal. 2010).....	5
21	<i>Sanai v. Saltz</i> , 170 Cal.App.4th 746 (2009).....	15
22	<i>Secrest v. Security Nat'l Mortgage</i> , 167 Cal.App.4th 544 (2008).....	8

1	<i>Storek & Storek, Inc. v. Citicorp Real Estate, Inc.,</i>	
2	100 Cal.App.4th 44 (2002).....	7
3	<i>Tarmann v. State Farm Mutual Automobile Ins. Co.</i>	
4	2 Cal.App.4th 153 (1991).....	18
5	<i>Toscano v. Greene Music,</i>	
6	124 Cal. App. 4th 685, 692 (2004).....	9
7	<i>U.S. Cold Storage California v. Great W. Sav. & Loan Assoc.,</i>	
8	165 Cal.App.3d 1214 (1985).....	5
9	<i>Vasquez v. L.A. County</i>	
10	487 F.3d 1246, 1258 (9 th Cir. 2007).....	4
11	<i>Wall Street Network, Ltd. v. New York Times Co.,</i>	
12	164 Cal.App.4th 1171, 1178 (2008).....	12
13	<i>Williams v. Koenig,</i>	
14	219 Cal.656 (1934).....	5

Statutes

15	<i>Bus. & Prof. Code</i> § 17204.....	19
16	<i>Civil Code</i> § 1624	8
17	<i>Civil Code</i> § 1698	8

Other Authorities

18	4 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 9:154 at 507-08.....	5
19	Miller & Starr, California Real Estate (3d ed. 2000),	
20	Deeds of Trust, § 10:212	6

Rules

21	Federal Rule of Civil Procedure 9(b).....	18
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jay Ta-Chieh Yeh (**plaintiff**) obtained a \$681,500 loan secured by a deed of trust on property located at 1231 Swordfish Street, Foster City, California 94404 in 2007. Plaintiff admittedly ceased making payments on his loan, and has not made a payment in over two years. Accordingly, foreclosure proceedings were initiated. Eventually, the property was sold at a trustee's sale in May 2012. Notwithstanding, plaintiff brings this lawsuit to set aside the trustee's sale and essentially award plaintiff a free home.

Plaintiff's boilerplate first amended complaint (**FAC**) alleges nine causes of action based on a vaguely asserted set of erroneous facts which bear little resemblance to the actual events surrounding the foreclosure of the property and loan at issue, the FAC fails to state a claim against Bank of America, N.A. (**BANA**) under any legal theory. Defendant's motion to dismiss should be granted with prejudice for various reasons, among them:

1. Plaintiff's claims are barred by his failure to tender the amount due on his loan;

2. Several of plaintiff's claims are premised on alleged advice provided by a representative from defendant Green Tree, not BANA, the alleged advice cannot form the basis for liability against BANA;

3. To the extent plaintiff's claims are premised on alleged oral representations, they are barred by the statute of frauds; and

4. Each of plaintiff's individual claims are vaguely pleaded, contradicted by the judicially noticeable documents, and insufficient to state a claim.

This case is straightforward: plaintiff knowingly obtained a loan that he could no longer afford, accepted the loan proceeds, and then admittedly defaulted on the loan. As a result, foreclosure was initiated and plaintiff now asks the Court to intercede to thwart the consequences of his own actions. Because plaintiff's FAC is fatally flawed,

1 BANA respectfully ask that the Court grant its motion, and dismiss this action with
2 prejudice as to BANA.

3 II. FACTUAL SUMMARY

4 On or about November 8, 2007, plaintiff Jay Ta-Chieh Yeh (**plaintiff**) obtained a
5 loan from BANA for \$681,500.00 (the **Loan**). (FAC, ¶ 8; Request for Judicial Notice
6 (**RJN**), Ex. 1.) The terms of the Loan were set forth in a promissory note (the **note**),
7 repayment of which was secured by a deed of trust (**deed of trust** or **DOT**) to real
8 property located at 1231 Swordfish Street, Foster City, California (the **property**).
9 (**RJN**, Ex. 1.) The DOT identifies BANA as the lender and PRLAP, Inc. as the trustee.
10 (*Id.*)

11 By March of 2010, plaintiff had stopped making payments on his loan. (**RJN**,
12 Ex. 2.) Due to his continuing nonpayment, on or about June 15, 2011, Seaside Trustee,
13 Inc. (**Seaside**), as agent for the beneficiary under the DOT, executed a notice of default
14 and election to sale. (**RJN**, Ex. 3.) By that time, plaintiff's loan was already
15 \$30,925.77 in arrears. (*Id.*)

16 On or about July 18, 2011, Seaside was substituted as trustee under the deed of
17 trust. (**RJN**, Ex. 4.) The substitution of trustee was recorded on October 5, 2011.

18 On the same day, Seaside, as substituted trustee, caused to be recorded a notice
19 of trustee's sale setting a sale date of October 28, 2011. (**RJN**, Ex. 5.) After several
20 postponements, the foreclosure sale ultimately went forward on May 25, 2012. (**RJN**,
21 Ex. 6.)

22 Plaintiff filed this action on October 22, 2012, alleging a slew of erroneous
23 allegations against BANA. Then, realizing that his complaint was meritless, plaintiff
24 filed his FAC based on the same underlying facts. Plaintiff's FAC, however, is equally
25 deficient. The majority of plaintiff's FAC is premised on the allegation that in 2011
26 plaintiff was induced to fall behind on his mortgage payments with the hope of
27 securing a loan modification. (FAC, ¶ 10.) Plaintiff's loan history, however, shows
28 that plaintiff ceased making payments on his mortgage in March 2010, over a year

1 prior to when he was allegedly advised to stop making his payments. (RJN, Ex. 2.)
 2 Furthermore, the FAC frequently refers to actions or representations made by
 3 "defendant(s)" without identifying which defendant is meant. The FAC appears to be a
 4 form complaint, with little regard to the accuracy of the claims made.

5 Accordingly, BANA now moves to dismiss plaintiff's FAC.

6 III. LEGAL STANDARD ON MOTION TO DISMISS

7 "To survive a motion to dismiss, a complaint must contain sufficient factual
 8 matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim
 9 has facial plausibility when the plaintiff pleads factual content that allows the court to
 10 draw the reasonable inference that the defendant is liable for the misconduct alleged."
 11 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Thus, a court need not accept as true
 12 conclusory allegations, unreasonable inferences, legal characterizations, or
 13 unwarranted deductions of fact contained in the complaint. *Clegg v. Cult Awareness*
 14 *Network*, 18 F.3d 752, 754-755 (9th Cir. 1994).

15 In *Iqbal*, the Supreme Court reviewed the standard for a pre-answer motion to
 16 dismiss. It explained that a complaint must offer more than an "unadorned, the-
 17 defendant-unlawfully-harmed-me accusation." *Id.* at 1949. This means that "naked
 18 assertions devoid of further factual enhancement" no longer suffice to state a claim. *Id.*
 19 (internal quotation omitted). What is more, the facts actually pled must give rise to a
 20 plausible claim for relief. *Id.* A formulaic recitation of the elements, because of its
 21 conclusory nature, is disentitled to a presumption of truth. *Id.* at 1951.

22 In general, the court may not consider material other than the facts alleged in the
 23 complaint when deciding a motion to dismiss. *Anderson v. Angelone*, 86 F.3d 932, 934
 24 (9th Cir. 1996) ("A motion to dismiss ... must be treated as a motion for summary
 25 judgment ... if either party ... submits materials outside the pleadings in support or
 26 opposition to the motion, and if the district court relies on those materials."). However,
 27 the court may consider extrinsic documents when "the plaintiff's claim depends on the
 28 contents of a document, the defendant attaches the document to its motion to dismiss,

1 and the parties do not dispute the authenticity of the document....” *Kniesel v. ESPN*,
 2 393 F.3d 1068, 1076 (9th Cir. 2005); *see also Fin. Sec. Assurance, Inc. v. Stephens*,
 3 *Inc.*, 450 F.3d 1257, 1264 (11th Cir. 2006) (An exception exists “in cases in which a
 4 plaintiff refers to a document in its complaint, the document is central to its claim, its
 5 contents are not in dispute, and the defendant attaches the document to its motion to
 6 dismiss.”). This exception is designed to “[p]revent [] plaintiffs from surviving a Rule
 7 12 (b)(6) motion by deliberately omitting references to documents upon which their
 8 claims are based.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).¹

9 Dismissal with prejudice is proper if “it is clear that the complaint could not be
 10 saved by any amendment.” *Livid Holdings, Ltd. v. Solomon Smith Barney, Inc.*, 416
 11 F.3d 940, 946 (9th Cir. 2005). In fact, a court can dismiss claims without granting
 12 leave to amend if amending the complaint would be futile. *See Vasquez v. L.A. Cnty.*,
 13 487 F.3d 1246, 1258 (9th Cir. 2007) (“Granting Vasquez leave to amend would have
 14 been futile, and we hold that the district court did not err in preventing such futility.”)

15 IV. LEGAL ARGUMENT

16 A. The Failure to Tender Bars Plaintiff's Equitable Claims

17 Plaintiff's FAC seeks relief from what he claims is a wrongful foreclosure.
 18 However, plaintiff's failure to tender the amount of the indebtedness renders any
 19 foreclosure-related claims deficient. This Court has recently ruled concerning the
 20 California's tender rule, that “under California law, ‘[a] valid and viable tender of
 21 payment of the indebtedness owing is essential to an action to cancel a voidable sale
 22 under a deed of trust.’” *Agbabiaka v. HSBC Bank USA Nat'l Ass'n*, No. C 09-05583
 23

24
 25 ¹ Defendants submit Exhibit 2 pursuant to this doctrine. The authenticity of the
 26 payment statement is not reasonably disputed. Plaintiff relies on his allegation that he
 27 fell behind only because a Green Tree representative advised him to fall behind.
 28 Plaintiff, however, stopped making payments in March 2010, almost a year before the
 alleged representation by Green Tree. Plaintiff's payment history is central to his claims
 against BANA.

1 JSW, 2010 WL16009974, at *6 (N.D. Cal. April 20, 2010)) (quoting *Karlsen v.*
 2 *American Savings and Loan Assoc.*, 15 Cal.App.3d, 112, 117-118 (1971)).

3 Before plaintiff can ask this Court to equitably set aside the foreclosure sale, he
 4 must first “do equity” by tendering the amount he owed on the loan prior to the sale.
 5 *See Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 290-91 (1911); *Williams v.*
 6 *Koenig*, 219 Cal. 656, 660 (1934); *U.S. Cold Storage Cal. v. Great W. Sav. & Loan*
 7 *Ass’n.*, 165 Cal.App.3d 1214, 1222 (1985) (cited authority omitted); 4 Miller & Starr,
 8 Cal. Real Estate (2d ed. 1989) § 9:154 at 507-08.

9 The “tender rule” applies not only to plaintiff’s request to set aside the
 10 foreclosure, but also to any causes of action that derive from the wrongful foreclosure
 11 allegations or seek redress from foreclosure. *Arnolds Mgmt. Corp. v. Eischen*, 158
 12 Cal.App.3d 575, 578-80 (1984). Thus, any cause of action implicitly integrated with
 13 allegations of an irregular sale fails unless the trustor can allege and establish a valid
 14 tender. *Id.* at 579. Because all of plaintiff’s claims are fatally interwoven with his
 15 allegation of an improper foreclosure, plaintiff’s FAC fails as a matter of law.

16 The court in *Anaya v. Advisors Lending Group*, No. CV F 09-1191 LJO DLB,
 17 2009 WL 2424037 (E.D. Cal. Aug. 5, 2009), specifically held the plaintiff’s inability to
 18 tender barred her claim for injunctive relief and every other claim supporting this
 19 request, noting plaintiff “offer[ed] nothing to indicate that she is able to tender the debt
 20 to warrant disruption of non-judicial foreclosure.” *Anaya*, 2009 WL 2424037, at *10;
 21 *see Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1060-61 (E.D. Cal. 2010)
 22 (“An action to set aside a foreclosure sale, unaccompanied by an offer to redeem, **does**
 23 **not state a cause of action which a court of equity recognizes**”; entitling MERS to
 24 dismissal of **all** of plaintiffs’ claims against it, including claims of negligence, fraud,
 25 violation of *Business & Professions Code* § 17200, and wrongful foreclosure)
 26 (emphasis added); *Alicea v. GE Money Bank*, No. C 09-00091 SBA, 2009 WL
 27 2136969, at *3 (N.D. Cal. July 16, 2009) (“When a debtor is in default of a home
 28 mortgage loan, and a foreclosure is *either pending or has taken place*, the debtor must

1 allege a credible tender of the amount of the secured debt to maintain any cause of
 2 action for wrongful foreclosure.”) (emphasis added); *Jump v. Aurora Loan Servs. LLC*,
 3 *et al.*, No. 09 cv 189 W (NLS), 2009 WL 2020128, at *2 (S.D. Cal. July 10, 2009) (“A
 4 party has not alleged sufficient facts to state a cause of action unless he has tendered
 5 the obligation in full.”); *see also Odinma v. Aurora Loan Servs.*, No. C-09-4674 EDL,
 6 2010 WL 1199886, *2 (N.D. Cal. March 23, 2010) (“California district courts apply
 7 the tender rule in examining wrongful foreclosure claims”); *Montoya v. Countrywide*
 8 *Bank*, No. C09-00641 JW, 2009 WL 1813973, *11-12 (N.D. Cal. June 25, 2009)
 9 (“Under California law, the ‘tender rule’ requires that as a precondition to challenging
 10 a foreclosure sale, or any cause of action implicitly integrated to the sale, the borrower
 11 must make a valid and viable tender of payment of the debt”); *Abdallah v. Un. Sav.*
 12 *Bank*, 43 Cal.App.4th 1101, 1109 (1996); Miller & Starr, California Real Estate (3d ed.
 13 2000), Deeds of Trust, § 10:212, pp. 653-54 (“Without an allegation of such tender in
 14 the complaint that attacks the validity of the sale, the complaint does not state a cause
 15 of action.”).

16 Because plaintiff has not alleged tender, he cannot assert this action seeking
 17 relief from the foreclosure sale.

18 **B. Plaintiff's Claims Each Fail Individually**

19 Although this FAC should be dismissed for plaintiff's failure to tender alone,
 20 each cause of action individually fails to state a claim.

21 **1) Plaintiff's Claim for Breach of the Covenant of Good Faith and Fair** 22 **Dealing Fails**

23 Plaintiff's first cause of action alleges that BANA somehow breached the implied
 24 covenant of good faith and fair dealing when A Green Tree representative allegedly,
 25 "instructed him [plaintiff] to do so [default on his loan payments] in order to apply for a
 26 loan modification...." (FAC., ¶ 18.) The implied covenant depends upon express and
 27 enforceable contractual terms. “A plaintiff asserting a claim for breach of the implied
 28 covenant of good faith and fair dealing must allege: (1) a contract existed; (2) the

1 plaintiff did all, or substantially all, of the significant things the contract required; (3)
2 the conditions required for the defendant's performance had occurred; (4) the defendant
3 unfairly interfered with the plaintiff's right to receive the benefits of the contract; and
4 (5) the plaintiff was harmed by the defendant's conduct." *Carma Developers*
5 *(California), Inc. v. Marathon Development California, Inc.*, 2 Cal.App.4th 342, 373
6 (1992). The implied covenant cannot create, expand or contradict contractual terms, no
7 matter how seemingly unfair. *See, e.g., Storek & Storek, Inc. v. Citicorp Real Estate,*
8 *Inc.*, 100 Cal.App.4th 44 (2002); *Racine & Laramie, Ltd., Inc. v. Dept. of Parks and*
9 *Recreation*, 11 Cal.App.4th 1026, 1032, 1043-45 (1992). Moreover, "[n]o cause of
10 action for the tortious breach of the implied covenant of good faith and fair dealing can
11 arise unless the parties are in a 'special relationship' with 'fiduciary characteristics.'"
12 *Pension Trust Fund for Operating Engineers v. Fed. Ins. Co.*, 307 F.3d 944, 955 (9th
13 Cir. 2002).

14 Plaintiff's claim against BANA is premised on the allegation that a Green Tree
15 representative tricked plaintiff into not making his mortgage payments because he was
16 advised to stop making his mortgage payments in order to apply again for a possible
17 loan modification. Plaintiff specifically alleges that BANA did not provide the advice.
18 The only mention of such an allegation is against "Green Tree's employee, Erica
19 Holderness." (FAC, ¶¶ 11-12; 18.) Furthermore, plaintiff claims that the advice was
20 given after the denial of his loan modification application in April 2011. (*Id.*)
21 However, plaintiff stopped making payments on his mortgage in March 2010 and has
22 not made a single payment since. (RJN, Ex. 2.) Plaintiff's admitted default negates his
23 claimed performance under the loan contract as required for a breach of the covenant of
24 good faith and fair dealing, thus his claim should be dismissed.

25 As pointed out by plaintiff, "pursuant to Section 1 of the Deed of Trust" plaintiff
26 explicitly agreed to "make full and timely payments to this Lender in compliance with
27 his financing agreement." (FAC, ¶ 20.) The deed of trust specifically states that
28 plaintiff's failure to make his monthly payment will result in default and foreclosure.

1 (FAC, ¶ 39.) Plaintiff admittedly defaulted on his loan and has not made a payment
 2 since 2010. (FAC, ¶ 10.) The covenant of good faith and fair dealing cannot be used
 3 to expand or contradict the deed of trust. Thus, plaintiff's admission of failing to pay
 4 his monthly payment defeats his claim under the covenant.

5 Moreover, to the extent plaintiff's claim is based on oral representations
 6 modifying plaintiff's obligations under deed of trust, it violates the statute of frauds and
 7 is barred. A mortgage or deed of trust with a power of sale falls under the statute of
 8 frauds. *Civil Code* §§ 1624, 2922; *Secrest v. Sec. Nat'l Mortgage*, 167 Cal. App. 4th
 9 544, 552-53 (2008). The alleged statements by the Green Tree representative, which
 10 would constitute oral modifications of a written agreement, and are therefore
 11 unenforceable. *Civil Code* § 1698. A gratuitous oral agreement, *i.e.*, one not supported
 12 by consideration, is not sufficient to modify a loan obligation. *Raedeke v. Gibraltar*
 13 *Sav. & Loan Ass'n*, 10 Cal. 3d 665, 673 (1974). To be enforceable, the agreement is
 14 required to not only be in writing, but also to be signed by the party to be charged.
 15 Here, Green Tree's alleged statements regarding the potential for modification,
 16 postponement of the foreclosure process, or consequences for failure to pay fall under
 17 the statute of frauds—to be enforceable, the promises must be in writing. *Karlsen v.*
 18 *Am. Savings & Loan Ass'n*, 15 Cal. App. 3d 112, 121 (1971) (oral agreement to extend
 19 foreclosure period unenforceable). An alleged conversation between a Green Tree
 20 representative and plaintiff cannot change the obligations memorialized in the note and
 21 deed of trust.

22 Additionally, as a matter of law, plaintiff cannot establish a fiduciary
 23 relationship between himself and BANA. *See Gutierrez v. Wells Fargo Bank*, No. C
 24 08-5586 SI, 2009 WL 322915 at *5 (N.D. Cal. Feb. 9, 2009). California law holds that
 25 there is no fiduciary duty between debtor and creditor. In *Price v. Wells Fargo*, the
 26 court observed: "It has long been regarded as 'axiomatic that the relationship between a
 27 bank and its depositor arising out of a general deposit is that of a debtor and creditor. A
 28 debt is not a trust and there is not a fiduciary relation between debtor and creditor as

1 such.' The same principle should apply with even greater clarity to the relationship
 2 between a bank and its loan customers." *Kim v. Sumitomo Bank*, 17 Cal. App. 4th 974,
 3 979 (1993) (*quoting Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 476 (1989)). A
 4 financial institution generally owes borrowers no duty, meaning an essential element of
 5 a claim for breach of the implied covenant of good faith and fair dealing cannot be
 6 established. *Nymark v. Heart Fed. Sav. & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096
 7 (1991). For these reasons, the cause of action must be dismissed with prejudice.

8 **2) Plaintiff's Promissory Estoppel Claim Fails**

9 Plaintiff's second cause of action for promissory estoppel relies on the same
 10 conclusory and false allegations as his claim for breach of covenant, i.e. that
 11 "defendants," through Green Tree representative Ms. Holderness, advised plaintiff to
 12 stop making his mortgage payments in order to apply for a loan modification and that
 13 the property would not be foreclosed on while he was reviewed. (FAC, ¶ 25.)
 14 Plaintiff's allegations are insufficient to state a claim for promissory estoppel against
 15 BANA.

16 The elements of promissory estoppel are: (1) a clear promise, (2) reliance, (3)
 17 substantial detriment, and (4) damages "measured by the extent of the obligation
 18 assumed and not performed." *Toscano v. Greene Music*, 124 Cal. App. 4th 685, 692
 19 (2004). Promissory estoppel is "a doctrine which employs equitable principles to
 20 satisfy the requirement that consideration must be given in exchange for the promise
 21 sought to be enforced." *Kajima/Ray Wilson v. Los Angeles County Metropolitan*
 22 *Transportation Authority*, 23 Cal.4th 305, 310, 1 P.3d 63 (2000). "Plaintiff's
 23 misguided belief or guileless action in relying on a statement on which no reasonable
 24 person would rely is not justifiable reliance. . . . 'If the conduct of the plaintiff in the
 25 light of his own intelligence and information was manifestly unreasonable, . . . he will
 26 be denied a recovery.'" *Kruse v. Bank of America*, 202 Cal.App.3d 38, 54 (1988)
 27 (citation omitted). A mere "hopeful expectation[]" cannot be equated with the necessary
 28 justifiable reliance." *Id.* at 55.

Here, plaintiff alleges that he relied to his detriment on statements made by a Green Tree representative. Plaintiff, however, fails to allege a promise that is "clear and unambiguous in its terms." *Laks*, 60 Cal.App.3d at 890; *Locke v. Wells Fargo*, 2010 WL 4941456, at *4 (S.D. Fla. Nov. 30, 2010) (holding promissory estoppel claim fails because the final monthly payment and other terms of the permanent modification were undetermined). Plaintiff merely alleges that a Green Tree representative gave him advice concerning a possible future loan modification. Plaintiff does not allege that he was promised a loan modification. Plaintiff does not allege or specify the basic terms of a clear and unambiguous offer of loan modification, such as interest rate, loan duration, and method of repayment. *Laks*, 60 Cal.App.3d at 891. That fatal flaw does not vanish merely because plaintiff asserts his claim as one for promissory estoppel rather than one for breach of contract. *Glen Holly Ent'mt, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1101 (C.D. Cal. 1999) (granting motion to dismiss on promissory estoppel claim because the "alleged promises do not have definite terms").

Plaintiff also alleges that "defendants" deceived him by promising that the foreclosure process would be delayed while his modification application was under review. Plaintiff claims that he relied to his detriment on this alleged representation, but fails to explain how his alleged reliance caused him any harm. Plaintiff's claim of detrimental reliance is contradicted by his admission that the foreclosure process was delayed for over two years, and it was not until after several modification applications were denied that the notice of default was recorded. The modification application did not prevent plaintiff from pursuing other remedies and alternatives or from taking any other lawful measures to alleviate his debt obligations. Plaintiff could have pursued other remedies and strategies whether or not he was being reviewed for a possible modification. If anything, the postponement of the foreclosure sale for two years during the application process afforded plaintiff greater opportunity to save his property and to deal with his default by enabling him to save money every month to put toward other remedies and strategies and, at the same time, remain in the property.

1 Plaintiff simply cannot establish harm. The foreclosure was the result of plaintiff's
2 default under the terms of the loan and nothing more.

3 Moreover, plaintiff could not reasonably rely on oral representations that
4 modified the deed of trust, because, as discussed above, this would violate the statute
5 of frauds. Plaintiff has failed to state a claim and this cause of action should be
6 dismissed.

7 **3) Plaintiff's Claim for Violation of *Civil Code* Section 2924 Fails**

8 Plaintiff's third cause of action is brought under Cal. *Civil Code* § 2924. Plaintiff
9 claims that somehow he was not in breach of his obligations under the deed of trust
10 prior to the invocation of the power of sale in violation of section 2924c. (FAC, ¶ 33.)
11 However, plaintiff admits that he failed to make his required loan payments and
12 specifically cites to the section of the deed of trust, which plaintiff executed, that
13 required plaintiff make "full and timely payments to his Lender" to comply with the
14 deed of trust. (FAC, ¶ 20.) The deed of trust explicitly grants the power of sale to the
15 trustee based on failure to make full and timely payments. (FAC, ¶ 39; RJN, Ex. 1.)
16 Plaintiff admits to defaulting on his loan, therefore based on the deed of trust, Seaside,
17 as substituted trustee, was authorized to initiate foreclosure proceedings, and plaintiff's
18 conclusory allegation otherwise is meritless.

19 Plaintiff further contends that BANA violated section 2924c by failing to
20 provide him with notice of the nature of the breach. (FAC, ¶ 34.) This contention is
21 contradicted by the notice of default which explicitly provided plaintiff with notice of
22 the nature of the breach. The notice of default states that "a breach of, and default in,
23 the obligations for which [the deed of trust] is security has occurred in that payment has
24 not been made of: **Installment of interest only payments which became due on**
25 **12/1/2010 plus late charges if any, and all subsequent interest, advances, late**
26 **charges and foreclosure fees and costs that become payable."** (RJN, Ex. 3
27 (emphasis in original).) Despite plaintiff's allegations to the contrary, the notice of
28 default provided plaintiff with notice of the nature of his breach. Plaintiff's additional

1 vague allegation that the amount in arrears stated on the notice of default was inflated
 2 because of improper late fees and attorneys' fees is also contradicted by the deed of
 3 trust. Plaintiff fails to specify what fees or costs were inflated or improper. Moreover,
 4 the deed of trust explicitly allows for the collection of late charges, foreclosure fees,
 5 and attorneys' costs in the event of breach by plaintiff. (RJN, Ex. 1.) Plaintiff's claim
 6 for violation of section 2924 is contradicted by the publicly recorded foreclosure
 7 documents and is entirely meritless, thus it should be dismissed with prejudice.

8 **4) Plaintiff's Breach of Contract Claim Fails**

9 Plaintiff claims that BANA breached the note and deed of trust by instituting
 10 foreclosure proceedings on the property. (FAC, ¶ 39.) Plaintiff seemingly ignores the
 11 fact that he defaulted on his loan and has not made a payment in more than two years.
 12 And foreclosure, including the power of sale, is explicitly provided in the event of
 13 plaintiff's default under the note, deed of trust, and California's nonjudicial foreclosure
 14 statutes. (FAC, ¶ 39; RJN, Ex. 1.)

15 Breach of contract in California requires a plaintiff to establish (1) a contract, (2)
 16 plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4)
 17 damage to plaintiff. *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th
 18 1171, 1178 (2008). Plaintiff is simply unable to establish the necessary elements for a
 19 breach of contract claim.

20 Despite admitting to ceasing to make his mortgage payments, plaintiff claims
 21 that he did not default under the note and deed of trust. He claims that his failure to
 22 make his payments is excused because "plaintiff was repeatedly advised not to make
 23 his payments" and therefore, somehow, "he was not in breach of the deed of trust."
 24 (FAC, ¶ 39.) Plaintiff's claim is based on his allegation that after being denied a loan
 25 modification in April 2011, he was allegedly advised by Green Tree to stop making his
 26 mortgage payment in order to apply for another loan modification. (FAC, ¶ 10.)
 27 Plaintiff, however, ceased making payments on his mortgage in 2010, more than a year
 28 before the advice was allegedly given. (RJN, Exs. 2-3.) Plaintiff cannot allege his

1 performance or an excuse for his nonperformance under the note and deed of trust, thus
2 his claim for breach of contract fails.

3 Likewise, plaintiff is unable to plead a breach by BANA. It is clear that the note
4 and deed of trust contemplate the initiation of foreclosure procedures, including the
5 right to accelerate and invoke the power of sale, in the event the borrower defaults
6 under the instruments. (FAC, ¶ 39; RJN, Ex. 1.) Plaintiff admits to failing to make his
7 monthly payments, thus defaulting under the note and deed of trust. Based on
8 plaintiff's admitted default, BANA did not breach the agreement by initiating the
9 foreclosure process or invoking the power of sale, and plaintiff's breach of contract
10 claim fails.

11 Furthermore, as discussed above, plaintiff's allegations of oral representations to
12 modify his original loan obligations are barred by the statute of frauds.

13 Because plaintiff's claims are barred by the statute of frauds, he is unable to
14 plead his performance, or a breach by BANA, plaintiff's claim should be dismissed
15 with prejudice.

16 **5) Plaintiff's Reformation of Contract Claim Fails**

17 Conceding that he defaulted on his loan obligations and foreclosure was proper
18 under the note and deed of trust, plaintiff attempts to save his complaint by alleging
19 that section 7(B) of the note, which states that a borrower will be in default if they fail
20 to pay the full amount of each monthly payment by the due date, was unconscionable.
21 (Compl., ¶ 59.) Plaintiff's attempt to salvage his FAC fails.

22 As an initial matter, plaintiff's request for reformation due to unconscionability is
23 barred by the statute of limitations. *See Yerkovich v. MCA, Inc.*, 11 F.Supp.2d 1167
24 (C.D. Cal. Feb. 24, 1997) ("the applicable statutory period for an unconscionability
25 claim [is] four years."). The California statute of limitations for claims based on a
26 written contract is four years. *See Civ. Proc. Code* § 337(1). Additionally, California's
27 catch-all statute of limitations is also four years. *See Civ Proc. Code* § 343 ("An action
28 for relief not hereinbefore provided for must be commenced within four years after the

1 cause of action shall have accrued.”). An unconscionability claim accrues “when the
 2 allegedly unconscionable contract is formed.” *Yerkovich*, 11 F.Supp.2d at 1173. Here,
 3 the contract was formed in November 2007. Plaintiff filed his complaint in October
 4 2012, almost a year late. As a result, plaintiff's unconscionability defense is barred by
 5 the statute of limitations. However, even if it were not barred by the statute of
 6 limitations, plaintiff's claim still fails.

7 In California, unconscionability has a procedural and substantive aspect. *See*,
 8 e.g., *Abramson v. Juniper Networks, Inc.*, 115 Cal.App.4th 638, 655 (2004).
 9 Procedural unconscionability refers to the manner in which a contract is negotiated,
 10 including the surrounding circumstances, the relevant factors being oppression and
 11 surprise. *Id.* at 655. Here, plaintiff does not allege any facts related to the
 12 circumstances in which the loan was negotiated.

13 Moreover, plaintiff does not claim that the definition of default was in any way
 14 “hidden” from him. *See Parada v. Superior Court*, 176 Cal.App.4th 1554, 1573
 15 (2009). He also cannot allege that he was without many realistic alternatives to taking
 16 out a loan from BANA. *See id.* As a result, plaintiff cannot demonstrate procedural
 17 unconscionability.

18 Plaintiff's allegations are also insufficient to demonstrate substantive
 19 unconscionability. Substantive unconscionability refers to the terms of the agreement,
 20 specifically whether they “shock the conscience.” *Abramson*, 115 Cal.App.4th at 655.
 21 Plaintiff does not explain how defining failure to make required monthly payments
 22 under the loan as a default would possibly “shock the conscience.”

23 Plaintiff does not dispute that he read the note and deed of trust and willingly
 24 agreed to their terms. BANA is not required to assume that plaintiff did not understand
 25 his requirements under the agreement when he gave no indication that that was the
 26 case. Furthermore, plaintiff does not allege how the definition of default was unfair or
 27 different from the legally accepted standard practice in the mortgage industry.

28 Finally, no matter how unsophisticated a borrower may be, it is self-explanatory

1 that the failure to make required loan payments will result in default. Plaintiff's
 2 nonsensical allegation that the loan is unconscionable because the note states that
 3 failure to make required monthly payments will result in default has no merit.

4 For these reasons, plaintiff's claim fails as a matter of law and should be
 5 dismissed without leave to amend.

6 **6) Plaintiff's False Light Claim Fails**

7 Plaintiff claims that the initiation of nonjudicial foreclosure, including the
 8 recording of public notices and providing allegedly false information to different credit
 9 agencies, constituted an invasion of privacy by placing plaintiff in a false light. (FAC,
 10 ¶ 49.) Plaintiff's false light invasion of privacy claim fails as a matter of law.

11 Plaintiff's allegations do not support a false light invasion of privacy claim. As
 12 explained in the foregoing sections, plaintiff admittedly defaulted under the loan and
 13 mortgage agreement, entitling defendants to begin nonjudicial foreclosure proceedings.
 14 Therefore, nothing contained in the notice of default was false as a matter of law.

15 Furthermore, as to plaintiff's claim concerning BANA allegedly providing false
 16 information to credit reporting agencies, plaintiff's claim is preempted by the Fair
 17 Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (**FCRA**). *See El-Aheidab v. CitiBank,*
 18 *NA*, No. 3:11-cv-02588-MMA-(BGS), 2012 WL 871321, at *6-9 (N.D. Cal. Feb. 15,
 19 2012) ("[A] plaintiff cannot sustain a state common law or statutory claim related to
 20 duties set forth in section 1681s-2 [relating to the responsibilities of persons who
 21 furnish information to consumer reporting agencies], **even if plaintiff alleges**
 22 **defendant reported false information with malice or willful intent to injure.**"). To
 23 the extent plaintiff's false light case of action is based on allegations that "Defendant"
 24 furnished false information to the credit reporting agencies, it is clearly preempted by
 25 15 U.S.C. § 1681t(b)(1)(F). Not only does the text of FCRA compel this result, it is
 26 also the holding in recent analogous cases. *See El-Aheidab*, 2012 WL 871321, at *6-9;
 27 *see also Miller*, --- F. Supp. 2d ---, 2012 WL 871321, at *6-8; *Sanai v. Saltz*, 170
 28 Cal.App.4th 746 (2009) ("[Section] 1681f(b)(1)(F) totally preempts all state common

1 law tort claims against furnishers of credit information arising from conduct regulated
2 by 15 U.S.C. § 1681s-2," including plaintiff's slander and libel common law claims).

3 **7) Plaintiff's Elder Abuse Claim Fails**

4 Plaintiff's seventh cause of action for elder abuse is based on the same
5 demonstrably false allegations as plaintiff's previous claims and therefore fails for the
6 reasons discussed throughout this motion. Furthermore, plaintiff fails to plead the
7 elements for an elder abuse claim.

8 Financial elder abuse is defined in *Welf. & Inst. Code* § 15610.30(a), which
9 provides:

10 "Financial abuse" of an elder or dependent adult occurs when a person or
11 entity does any of the following: (1) Takes, secretes, appropriates, or
12 retains real or personal property of an elder or dependent adult to a
13 wrongful use or with intent to defraud, or both. (2) Assists in taking,
14 secreting, appropriating, or retaining real or personal property of an elder
15 or dependent adult to a wrongful use or with intent to defraud, or both."
16 *Id.*, § 15610.30(a)(1)-(2).

17 Plaintiff has not pled an actionable claim of elder abuse against BANA here.
18 Plaintiff does not identify anything BANA did to actually defraud him, even though an
19 elder abuse theory, as a statutory claim, should be pled with particularity. *Covenant*
20 *Care, Inc. v. Superior Court*, 32 Cal.4th771, 790 (2004); *Carter v. Prime Healthcare*,
21 198 Cal.App.4th 396, 407 (2011). The FAC does not specify (a) a false statement, (b)
22 at a specific time, (c) a basis to believe such a statement was made with intent to
23 defraud, (d) by an identified person, (e) acting with authority for BANA that he relied
24 upon in failing to make his loan payments. At most, the FAC pleads that a Green Tree
25 representative provided advice concerning a possible loan modification. Providing
26 advice, however, does not constitute elder abuse. Furthermore, plaintiff alleges the
27 advice to stop making his payments was made in April 2011, but plaintiff stopped
28 making payments in 2010, more than a year prior to the alleged representation by
Green Tree. Likewise, plaintiff admits that his loan was reviewed for a loan

1 modification, but ultimately it was found to not qualify. A loan failing to qualify for a
2 loan modification also does not constitute elder abuse.

3 Nor does the FAC plead that property was wrongfully taken from plaintiff.
4 Plaintiff admits to defaulting on his loan and the recorded documents evidence that the
5 foreclosure process was handled properly. Any harm experienced by plaintiff was the
6 result of his own actions in defaulting on his loan and failing to bring his loan current,
7 not any actions by BANA.

8 **8) Plaintiff's Negligent Misrepresentation Claim Fails**

9 Plaintiff's misrepresentation claim is premised on the allegation that "Defendants
10 represented to Plaintiff on numerous occasions that there would be no negative
11 consequences for withholding mortgage payments..." (FAC, ¶ 61.) Plaintiff admits
12 that the only representations made were made by Green Tree, not BANA. Plaintiff is
13 simply unable to satisfy the elements for negligent misrepresentation against BANA.
14 To state a claim for negligent misrepresentation, a plaintiff must allege (1) the
15 misrepresentation of a past or existing material fact, (2) without reasonable ground for
16 believing it to be true, (3) with intent to induce another's reliance on the fact
17 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting
18 damage. *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Servs.*, 171 Cal.App.4th
19 35, 50 (Ct. App. 2009). Just as with intentional misrepresentation, claims for
20 "negligent misrepresentation must meet Rule 9(b)'s particularity requirement." *Neilson*
21 *v. Union Bank of Cal.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003); *see also Lorenz v.*
22 *Sauer*, 807 F.2d 1509, 1511-12 (9th Cir. 1987) ("Under California law, negligent
23 misrepresentation is a species of actual fraud...").

24 Initially, plaintiff's claim fails because, based on plaintiff's own allegations, there
25 was no misrepresentation. Plaintiff concedes that his loan modification applications
26 were reviewed and denied. (FAC, ¶¶ 11-13.) When plaintiff was unable to provide
27 sufficient proof of income, his loan modification application was finally denied and the
28 nonjudicial foreclosure process was initiated. (FAC, ¶ 13.) Therefore, as allegedly

1 promised, the foreclosure was put on hold while plaintiff's loan modification
2 application was reviewed. From the time of plaintiff's admitted default in March 2010,
3 to the finalization of the nonjudicial foreclosure process in May 2012, the foreclosure
4 process was delayed for over two years. Plaintiff's loan modification application was
5 reviewed, but ultimately his loan failed to qualify – this is insufficient for a
6 misrepresentation claim. BANA was not required to provide plaintiff with a loan
7 modification and plaintiff has pointed to no authority to the contrary. Moreover, the
8 alleged promise to not initiate foreclosure in the future does not constitute a
9 misrepresentation about a "past or existing material fact."

10 Furthermore, plaintiff's misrepresentation claim lacks merit because BANA
11 cannot be liable for "negligent" misrepresentation. As discussed previously, BANA
12 owes plaintiff no duty of care. A lender pursues its own economic interests in lending
13 money, not that of the borrower. *Nymark*, 231 Cal.App.3d at 1096

14 As a species of fraud, plaintiff's negligent misrepresentation claim must comply
15 with Rule 9(b). Rule 9(b) provides that "a party must state with particularity the
16 circumstances constituting fraud." "A pleading is sufficient under Rule 9(b) if it
17 identifies the circumstances constituting fraud so that the defendant can prepare an
18 adequate answer from the allegations." *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th
19 Cir. 1993). "The complaint must specify such facts as the times, dates, places, benefits
20 received, and other details of the alleged fraudulent activity." *Id.* at 672. Moreover, a
21 plaintiff must set forth an explanation of how or why alleged statements or
22 concealment are false or misleading. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541,
23 1547-48 (9th Cir.1994) (en banc). Further, when asserting fraud against a corporation,
24 a plaintiff must also specifically allege the names of the persons, their authority to
25 speak, to whom they spoke, what they said or wrote, and when it was said or written.
26 *See Tarmann v. State Farm Mutual Automobile Ins. Co.*, 2 Cal.App.4th 153, 157
27 (1991). The policy of liberal construction of the pleadings will not be invoked to
28 sustain a pleading alleging fraud. *G.D. Searle & Co. v. Superior Court*, 49 Cal.App.3d

22, 29 (1975); *Lazar v. Superior Court*, 12 Cal.4th at 645. Plaintiff does not come close to meeting the pleading requirements of Rule 9(b) with respect to BANA. Plaintiff merely alleges, conclusorily, that various "defendants" or "defendant" made representations to plaintiff. Plaintiff does allege that a Green Tree representative made certain representations. Plaintiff fails to demonstrate, however, any wrongdoing on the part of BANA, or to meet the particularity requirements for pleading fraud. Plaintiff also fails to allege how he relied on the purported representations, such that he was caused damage. Any damages suffered were a result of plaintiff's admitted default under the deed of trust, not any actions of BANA.

Plaintiff fails to allege a cause of action for fraud under any theory. Plaintiff's misrepresentation claim should be dismissed with prejudice.

9) Plaintiff's Claim for Violation of *Business & Professions Code* § 17200 Fails

Plaintiff's ninth cause of action is brought under California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code* § 17200, *et seq.* The UCL establishes three forms of unfair competition: (1) unlawful, (2) unfair, or (3) deceptive or fraudulent. *Cel-Tech Comm. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). Facts supporting a § 17200 claim must be pled with reasonable particularity. *Khoury v. Maly's of Cal.*, 14 Cal.App.4th 612, 619 (1993).

Plaintiff does not actually allege any new facts under his UCL claim, instead incorporating by reference every allegation asserted before it and listing his previous causes of action. (FAC, ¶¶ 63-71.) Plaintiff's UCL claim is the total opposite of a pleading with "reasonable particularity." As merely a restatement of plaintiff's previously failed claims, his UCL claim fails for all other reasons asserted throughout this motion.

Moreover, a plaintiff must have suffered an injury-in-fact and have lost money or property as a result of the unfair act. *Bus. & Prof. Code* § 17204; *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959-960 (9th Cir. 2009). Though plaintiff alleges he suffered

monetary damages, he merely mentions that these "include attorneys' fees and costs to save his home." (FAC, ¶ 72.) Plaintiff fails to allege how any claimed damages are the result of BANA's purportedly unfair acts. Fees, interest, and penalties assessed as a result of default cannot properly constitute damages under the UCL, particularly because plaintiff could have avoided the damages. *Lyons v. Bank of Am., NA*, 11-01232 CW, 2011 WL 3607608 (N.D. Cal. Aug. 15, 2011) ("a lowered credit score and having to defend against a wrongful foreclosure proceeding, even if caused by Defendants, could have been avoided if Plaintiffs had made timely mortgage payments."). To the extent plaintiff relies on the loss of his property, it is similarly insufficient to prove damages under the UCL. Plaintiff lost his property as a direct result of his default under the deed of trust, not any actions by BANA.

For these reasons, plaintiff's UCL claim should be dismissed with prejudice.

V. CONCLUSION

Plaintiff's FAC fails to allege any claims for relief. The claims themselves all fail and are legally and factually deficient. BANA respectfully requests the Court grant its motion to dismiss without leave to amend.

Dated: January 15, 2013

Respectfully submitted,

AKERMAN SENTERFITT LLP

By: s/ Karen Ciccone

Karen Ciccone
Taylor Broadhead
Attorney for Defendants
BANK OF AMERICA, N.A

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to this action. My business address is 725 South Figueroa Street, 38th Floor, Los Angeles, California 90017.

On January 15, 2013, I served the following document(s) described as:

**NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT; MEMORANDUM OF POINTS AUTHORITIES;
[PROPOSED] ORDER**

*****SEE ATTACHED SERVICE LIST*****

- ☐ (MAIL) I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.
- ☐ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for.
- ☐ (MESSENGER SERVICE) I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed and provided them to a professional messenger service for service. A separate Personal Proof of Service provided by the professional messenger service will be filed under separate cover.
- ☐ (FACSIMILE) Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- ☒ (E-MAIL or ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

AKERMAN SENTERFITT LLP

725 S. FIGUEROA STREET, SUITE 3800
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☒ (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed below by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction this service was made and that the foregoing is true and correct.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on **January 15, 2013**, at Los Angeles, California.

Karen Ciccone
(Type or print name)

/s/ Karen Ciccone

(Signature)

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SERVICE LIST

Yeh v. Bank of America, N.A., et al.

United States District Court, Northern District of California (San Francisco)

Case No. 3:12-cv-05940-EDL

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